

Name VICTOR AVINA

Address P.O. BOX 7500

CRESCENT CITY, CA 95531

CDC or ID Number # K15466

FILED

08 JUL 29 AM 11:28

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WHA

530

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(Court)

(PR)

<u>VICTOR AVINA</u>	
Petitioner	vs.
<u>ROBERT A. HOREL</u>	
Respondent	

PETITION FOR WRIT OF HABEAS CORPUS

WHA

No.

CV 08 3620

(To be supplied by the Clerk of the Court)

INSTRUCTIONS — READ CAREFULLY

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

This petition concerns:

☐ A conviction ☐ Parole
☐ A sentence ☒ Credits
☐ Jail or prison conditions ☐ Prison discipline
☐ Other (specify): _____

1. Your name VICTOR AVINA
2. Where are you incarcerated? PELICAN BAY STATE PRISON
3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. If criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon") or state reason for civil commitment: POSSESSION / PURCHASE COCAINE FOR SALE AND EXFELON ARMED WITH A FIREARM HS CODE
- b. Penal or other code sections: H11351.5 - P12022 (C)
- c. Name and location of sentencing or committing court: SUPERIOR COURT OF SAN MATEO COUNTY
- d. Case number: SC051714A
- e. Date convicted or committed: 10/30/2002
- f. Date sentenced: 10/21/2002
- g. Length of sentence: 12 years with 80%
- h. When do you expect to be released? 11/4/2011
- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address: ERIC J. MESSERSMITH, 50 CALIFORNIA ST., 15 TH FLOOR, SAN FRANCISCO, CA 94111

4. What was the LAST plea you entered? (check one)
☐ Not guilty ☐ Guilty ☒ Nolo Contendere ☐ Other _____
5. If you pleaded not guilty, what kind of trial did you have?
☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. (For example, "the trial court imposed an illegal enhancement.") If you have additional grounds for relief, use a separate page for each ground. Page 4 is designed so you can state ground 2. For additional grounds, make copies of page 4 and number the additional grounds in order.

THE PETITIONER IS SERVING A "NON-VIOLENT" COMMITMENT IN CALIFORNIA DEPARTMENT OF
CORRECTION AND REHABILITATION (CDCR), FOR POSSESSION FOR SALES OF COCAINE AND EXFELON IN
POSSESSION OF A FIREARM, WHICH IS BEING OVER SHADOWED BY A PRIOR "VIOLENT" COMMITMENT
AFFECTING THE LENGTH OF CONFINEMENT.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages.

CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

THE PETITIONER'S WORK TIME / GOOD TIME CREDITS FOR A "NON-VIOLENT" PRISON COMMITMENT
ARE MISCALCULATED WITH THE APPLICATION OF WHICH GOVERNS THE "VIOLENT CRIME" WORK
TIME / GOOD TIME CREDITS, BY THE DEPARTMENT OF CORRECTIONS. THE DENIAL OF THE
APPROPRIATE APPLICATION OF THE WORK TIME / GOOD TIME CREDITS THAT GOVERNS "NON-VIOLENT"
CRIMES, IS THE CAUSE OF THE PETITIONER'S MISCALCULATED TERM OF CONFINEMENT. WHEREAS,
IF THE WORK TIME / GOOD TIME CREDITS WERE RECALCULATED IN ACCORDANCE TO THE
"NON-VIOLENT" CRITERIAS. THE PETITIONER'S PRISON CONFINEMENT WOULD BE REDUCED.
(SEE EXHIBIT A AND B)

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

1) IN RE FIDELON, 132 CAL. App. 4TH 1214 (2005)

2) IN RE TATE, 135 CAL. App. 4TH 756 (2006)

3) IN RE KEEVES, 35 CAL. 4TH 765 (2005)

7. Ground 2 (if applicable):

a. **Supporting facts:**

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There is no text or other markings on the paper.

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? Yes. ☒ No. If your answer is yes, give the following information about your appeal:

Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court")

Result _____ Date of decision _____

Case number or citation of opinion, if known _____

Issues raised: a. _____

b. _____

c. _____

d. _____

Were you represented by counsel on appeal? ☐ Yes. ☐ No. If yes, state the attorney's name and address, if known.

9. Did you seek review in the California Supreme Court? ☐ Yes. ☒ No. Result _____

Date of decision _____ Case number or citation of opinion, if known _____

Issues raised: a. _____

b. _____

c. _____

d. _____

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal: THE PETITIONERS TIME LIMITATION FOR RELIEF BY APPEAL HAVE EXPIRED AND THE RECENT STATE COURT DECISION IN THE CASES CITED ON PAGE 3, #6 b.

11. Administrative Review:

- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In Re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].)

Explain what administrative review you sought or explain why you did not seek such review:

THE PETITIONER DID NOT SEEK NOR EXHAUSTED ANY ADMINISTRATIVE AVENUES DUE TO THE RELIEF CAN ONLY COME FROM THE COURT'S TO CORRECT THE DEPARTMENT'S OF CORRECTION'S MISINTERPRETATION OF APPLICATION OF WORK TIME / GOOD TIME CREDITS. THAT IS, THE PETITIONER IS CONVICTED OF A "NON-VIOLENT" FELONIES, HOWEVER, WORKTIME CREDITS ARE THOSE APPLIED TO "VIOLENT FELONY" OFFENSES IN WHICH THE PETITIONER HAS A "PRIOR CONVICTION" AND IS NO LONGER SERVING THAT PRISON SENTENCE.

- b. Did you seek the highest level of administrative review available? ☐ Yes. ☒ No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you previously filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes. If yes, continue with number 13. ☒ No. If no, skip to number 15.

13. (1) Name of court _____

Nature of proceeding (for example, "habeas corpus petition") _____

Issues raised: a. _____

b. _____

c. _____

Result (Attach order, if available) _____ Date of decision _____

(2) Name of court _____

Nature of proceeding _____

Issues raised: a. _____

b. _____

c. _____

Result (Attach order, if available) _____ Date of decision _____

For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result.

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

THE CALIFORNIA DEPARTMENT OF CORRECTION AND REHABILITATION'S JUDGMENT WITHOUT KNOWLEDGE
DETERMINING AN APPROPRIATE APPLICATION / INTERPRETATION OF PC SECTION 2933.1 (a). A RECENT
CALIFORNIA COURT DECISION ON CREDITS RECACULATION IN A RETROACTIVE STATE COURT DECISION.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known.

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain.

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court.

THE RECENT STATE COURT DECISIONS OF RETROACTIVE CREDIT RECACULATION OF PRISONERS
RELEASE DATES.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 7.24.08

Hira

(Signature of Petitioner)

EXHIBIT

"A"

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

[Not to be used for multiple count convictions or for 1/3 consecutive sentences.]

CR-290.1

<input checked="" type="checkbox"/> SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO <input type="checkbox"/> MUNICIPAL BRANCH OR JUDICIAL DISTRICT 41100		<div style="font-size: 2em; font-weight: bold;">FILED</div> <div style="font-weight: bold;">SAN MATEO COUNTY</div> <div style="font-size: 1.5em; margin-top: 10px;">OCT 25 2002</div> <div style="margin-top: 10px;">Clerk of the Superior Court</div> <div style="margin-top: 10px;">By DEPUTY CLERK</div>
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: VICTOR MANUEL AVINA JR. DOB: 04-27-77 CASE NUMBER SC051714A AKA: VICTOR MANUEL AVINA, ETC. CII#: 009719323 BOOKING #: 1040293 <input type="checkbox"/> NOT PRESENT		
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT PRESENT <input type="checkbox"/> AMENDED ABSTRACT		
DATE OF HEARING 10-21-02	DEPT. NO. 21	
CLERK ANDREA DALEY	REPORTER CINDY DEL ROSARIO	PROBATION NO. OR PROBATION OFFICER NONE STATED
COUNSEL FOR PEOPLE WAGSTAFFE		COUNSEL FOR DEFENDANT MESSER SMITH <input checked="" type="checkbox"/> APPTD.

1. Defendant was convicted of the commission of the following felony:

CNT.	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY			TERM (L, M, Y)	TIME IMPOSED	
						JURY	COURT	PLEA		YRS.	MOS.
1	HS	11351.5	POSSESS FOR SALE COCAINE BASE	2002	10-21-02			X	M	*8	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

CNT.	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL
1	12022(C)	4							4

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. ☒ Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes). *

5. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

- a. RESTITUTION FINE of: **\$200.0** per PC 1202.4(b) forthwith per PC 2085.5.
- b. RESTITUTION FINE of: \$ per PC 1202.45 suspended unless parole is revoked.
- c. RESTITUTION of: \$ per PC 1202.4(f) to ☐ victim(s)* ☐ Restitution Fund
 (*List victim name(s) if known and amount breakdown in item 7, below.)
 (1) ☐ Amount to be determined. (2) ☐ Interest rate of: % (not to exceed 10% per PC 1204.4(f)(3)(F)).
- d. ☐ LAB FEE of: \$ for counts: per H&SC 11372.5(a).
- e. ☐ DRUG PROGRAM FEE of \$150 per H&SC 11372.7(a). f. ☐ FINE of \$ per PC 1202.5.

6. TESTING: ☐ AIDS ☐ DNA pursuant to ☐ PC 1202.1 ☐ PC 290.2 ☐ other (specify): **296PC AFTER 1-99**

Other orders (specify): **DEFENDANT SHALL REGISTER AS REQUIRED PURSUANT TO HS 11590N AS A NARCOTICS OFFENDER.**

WEAPON IS ORDERED ABATED PURSUANT TO PC 12028.

8. TOTAL TIME IMPOSED: 12 0

9. ☐ This sentence is to run concurrent with (specify):

10. Execution of sentence imposed

- a. ☒ at initial sentencing hearing. d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
- b. ☐ at resentencing per decision on appeal. e. ☐ other (specify):
- c. ☐ after revocation of probation.

11. DATE SENTENCE PRONOUNCED **10-21-02** CREDIT FOR TIME SPENT IN CUSTODY **421** INCLUDING: ACTUAL LOCAL TIME **281** LOCAL CONDUCT CREDITS **140** ☐ 4019 SERVED TIME IN STATE INSTITUTION ☐ 2933.1 ☐ DMH ☒ CDC ☐ CRC

12. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays. To be delivered to ☐ the reception center designated by the director of the California Department of Corrections. ☒ other (specify): **SAN QUENTIN STATE PRISONS.**

CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE VIRILIO S. CASTRO	DATE 10-25-02
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This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

EXHIBIT

"B"

CDC NUMBER	NAME	ETHNIC	BIRTHDATE
K15466	AVINA, VICTOR, MANUEL	HIS	04/27/1977

ACA AVINA, VICTOR, MANUEL, JR

TERM STARTS	MAX REL DATE	MIN REL DATE	MAX ADJ REL DT	MIN ADJ REL DT
10/30/2002	08/23/2013	12/07/2011	08/23/2013	12/07/2011

BASE TERM	8/00 + ENHCMNTS	4/00 = TOT TERM	12/00	PAROLE PERIOD
				3 YRS

PRE-PRISON + POST SENTENCE CREDITS

CASE	P2900-5	P1203-3	P2900-1	CRC-CRED	MH-CRED	P4019	P2931	POST-SENT	TOT
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SC051714A

281

140

8

429

REGISTRATION REQUIRED PER H11590
PC296 DNA COMPLETED

RCV DT/ CNT	COUNTY/ OFF-CODE	CASE DESCRIPTION	SENTENCE DATE	CREDIT CODE	OFFENSE DATE
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CONTROLLING PRINCIPAL & CONSECUTIVE (INCLUDES ENHANCEMENTS/OFFENSES):

--CONTROLLING CASE --

10/30/2002	SM	SC051714A	10/21/2002	NO STRIKES: 2	
01	H11351.5	POSS/PURCHASE COCAINE F/SALE		3	01/14/2002
		(H)WPN			
		P12022 (C)	02 ARMED F'ARM HS CODE	3	

TRAN TYPE	DATE	END DATE	LOG NUMBER	RULE NUMBER	D A Y S ASSESS LOST REST DEAD			
--------------	------	----------	------------	----------------	----------------------------------	--	--	--

BEG	07/26/1996			*****BEG BAL*****				
ADD	10/30/2002			SC051714A				
BCL	06/05/2003			B03060030 3005C	90	90		
ADD	10/30/2002			SC051714A				
BCL	12/12/2003			B03120077 3016 A	120	120		
ADD	10/30/2002			SC051714A				
ADD	10/30/2002			SC051714A				
BCL	02/02/2004			B04020030 3005C	90	90		
ADD	10/30/2002			SC051714A				
BCL	03/04/2005			E05030003 3005B	30	30		
ADD	10/30/2002			SC051714A				
BCR	08/09/2005			E05030003 3005B			30	
BCR	08/09/2005			B04020030 3005C			90	
BCR	08/09/2005			B03060030 3005C			90	

***** CONTINUED *****

CDC NUMBER	NAME
K15466	AVINA, VICTOR, MANUEL

ADD 10/30/2002 SC051714A

CURRENT PC BALANCE:	0	CURRENT BC BALANCE:	625
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PROOF OF SERVICE BY MAIL

(C.C.P. section 101a #2015.5; 20 U.S.C. section 1746)

I, VICTOR AVINA #K15466, am a resident of Pelican Bay State Prison, in the County of Del Norte, State of California. I am over eighteen (18) years of age and am a party to the below entitled action.

My Address is: P.O. Box 7500; Crescent City, CA 95531.

On the 24 day of JULY, in the year of 2008, I served the following documents: (set forth the exact title of documents served)

1) PETITION FOR WRIT OF HABEAS CORPUS; 2) REQUEST FOR APPOINTMENT OF COUNSEL
AND DECLARATION OF INDIGENCY; AND 3) IN FORMA PAUPERIS.

on the party(s) listed below by placing a true copy(s) of said document, enclosed in a sealed envelope(s) with postage thereon fully paid, in the United states mail, in a deposit box so provided at Pelican Bay State Prison, Crescent City, CA 95531 and addressed as follows:

<u>PETITION FOR WRIT OF HABEAS CORPUS</u>	_____
_____	_____
_____	_____
_____	_____
_____	_____

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 24 day of JULY, 2008.

Signed: 

(Declarant Signature)

PELICAN BAY STATE PRISON
5905 Lake Earl Dr
Crescent City CA 95532

\$01.30
JUL 25 2008
PM 1:59
ZIP CODE 95531

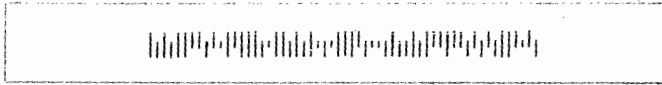
RECEIVED

JUL 28 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA



U.S. Northern Dist. of Ca.
U.S. Courthouse
450 Golden Gate Ave.
San Francisco, Ca. 94102-3483



Victor Aviña C8-213
P.O. Box 7500
Crescent City, CA 95531

Legal Mail